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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. 81-

RICHARD TUCKER, JR.,

Petitioner,

v.

WALTER D. ZANT, Warden,
Georgia Diagnostic and
Classification Center,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF BUTTS COUNTY, GEORGIA

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PETITION FOR WRIT OF CERTIORARI TO THE
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Petitioner, Richard Tucker, Jr., prays that a writ of certiorari be issued to review the judgements of the Superior Court of Butts County, Georgia entered on September 11, 1981 and January 29, 1982. Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia March 24, 1982.

CITATIONS TO OPINIONS BELOW

Application for certificate of probable cause to appeal was denied by the Supreme Court of Georgia on March 24, 1982. The order of the Supreme Court of Georgia and the unreported opinions of the Superior Court of Butts County are set out in Appendices A, B, and C respectively.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C §1257 (3), petitioner having asserted below and asserts in this Court deprivation of rights secured by the Constitution of the United States.

Discretionary review of the judgements of the Superior Court of Butts County was sought in the Supreme Court of Georgia pursuant to Ga. Code Ann. §24-4526. Review was denied March 24, 1982. Pursuant to Rule 20 of the Rules of the Supreme Court, the time for this petition runs from the denial of review issued by the Supreme Court of Georgia on March 24, 1982.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. This case involves the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States.

2. This case also involves the following provisions of the Code of Georgia, the texts of which are set out in Appendix D hereto:

Georgia Code Ann. §24-4526

Georgia Code Ann. §26-1101

Georgia Code Ann. §26-1311

Georgia Code Ann. §26-3102

Georgia Code Ann. §27-2534.1

Georgia Code Ann. §50-127

QUESTIONS PRESENTED

-1-

Whether Petitioner was denied his right to a fair trial, right to a relieable, nonarbitrary sentencing procedure, and right to due process of law as guaranteed by the Sixth, Eighth, and Fourteenth Amendments to Constitution of the United

States by prejudicial and inflamatory arguments, wholly unsupported by the evidence, made by the prosecutor at the penalty phase of Petitioner's bifurcated capital trial.

-2-

Whether Petitioner was denied his right against self-incrimination, right to a fair trial, right to a reliable, nonarbitrary sentencing determination and the right to due process of law as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution of the United States by the prosecutor's comment on Petitioner's exercise of his right not to testify during the guilt/innocence phase of his bifurcated capital trial.

HOW THE ISSUES WERE RAISED BELOW

Petitioner's state Petitions for Writ of Habeas Corpus filed in the Superior Court of Butts County, Georgia pursuant to Ga. Code Ann.§50-127 raised the Constitutional issues involved in the questions presented. The habeas corpus court denied the petitions. The constitutional issues were raised again on application for certificate of probable cause to appeal in the Supreme Court of Georgia which denied the application.

STATEMENT OF THE CASE

On January 12, 1979 Petitioner was convicted and sentenced to two death penalties in the Superior Court of Bibb County for kidnapping and murder. The judgements and sentences were affirmed by the Georgia Supreme Court in Tucker v. State, 245 Ga. 68, 263 S.E. 2d 109 (1980). Certiorari was denied by this Court. Tucker v. Georgia, 449 U.S. 891 (1980).

On March 27, 1981, Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County, Georgia. The petition was denied on September 11, 1981 (Appendix B). Subsequently, petitioner was permitted to file a second Petition for Writ of Habeas Corpus in the Superior Court of Butts County which was denied January 29, 1982 (Appendix C). A consolidated application for certificate of probable cause to appeal from the habeas corpus decisions was denied by the Georgia Supreme Court March 24, 1982 (Appendix A).

REASONS FOR GRANTING THE WRIT

I

PETITIONER WAS DENIED HIS RIGHT TO A FAIR TRIAL, RIGHT TO A RELIABLE, NONARBITRARY SENTENCING PROCEDURE, AND RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES BY PREJUDICIAL AND INFLAMATORY ARGUMENTS, WHOLLY UNSUPPORTED BY THE EVIDENCE, MADE BY THE PROSECUTOR AT THE PENALTY PHASE OF PETITIONER'S BIFURCATED CAPITAL TRIAL.

At the penalty phase of Petitioner's trial the prosecutor's arguments appealed to the passion and prejudice of the jury, misstated facts in evidence, refered to facts nowhere in evidence, contained the prosecutor's personal opinions, and contained other prejudicial and inflamatory statements.

Petitioner is a Black man. He was charged in Bibb County, Georgia with the murder of an elderly White woman. Petitioner was not charged with rape, and there was no evidence of rape offered at the trial. The prosecutor did not assert that petitioner committed rape until the penalty phase of petitioner's murder trial, at which time, with the aim of inflaming the passions of the jury, he said;

> I hate to say this with the family sitting in the courtroom because I know they don't want to believe this; they don't want to believe the type of punishment that this defendant imposed on their mother or their wife - but I think in your own mind you should be settled now by knowing that this man is a rapist and a murderer, that he forced Mrs. Sandefur to commit acts of oral sodomy on him and that he committed the offense of rape. (T Trial 893)

The prosecutor's inventive and unsupported assertion that Petitioner had forced the woman to commit oral sodomy on him and raped her helped provoke the jury to recommend a sentence of death. His argument was both unethical and unconstitutional. The ABA Standards on the Prosecution Function read:

> 5.8 Argument to the Jury
>
> (a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions and prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under controlling law, or by making predictions of the consequences of the jury's verdict.
>
> ABA Standards; The Prosecution Function §5.8

As this Court stated many years ago in Berger v. United States, 295 U.S. 78 (1934), the prosecutor must be held to a high standard of conduct. His interest in justice must come before his zeal to win his case; "while he may strike hard blows, he is not at liberty to strike foul ones." Supra, p. 88. The Court went on:

> It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. Supra, p. 88.

No matter what the exact constitutional limits on the prosecutor's behavior are, certainly a prosecutor cannot invent or fabricate evidence or lie while arguing the case of the state. "[T]he Fourteenth Amendment cannot tolerate a state criminal conviction obtained by the knowing use of false evidence." Miller

v. Pate, 386 U.S. 1, 7 (1967).

Narrow limits to prosecutorial behavior are especially necessary in a capital sentencing procedure in which there is a compelling public interest in ensuring the actual and apparent fairness of the outcome. The prosecutor's wild and unsupported allegations in his sentencing phase argument served only to enrage the jury, and ran directly contrary to this Court's stated objective for death penalty procedures.

> [T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is aforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake. Eddings v. Oklahoma, 50 U.S.L.W. 4161, 4165 (1982) (O'Conner, J., Concurring).

To permit improper argument in the sentencing phase of a captial trial conflicts not only with the standards of due process, but also with the Eighth Amendment's requirement of reliability in capital sentencing.

In his closing argument to the jury in the sentencing phase the prosecutor recited personal opinions. The personal opinions of the prosecutor are irrelevant, and as they may appear to imply information not admitted into evidence, federal courts consistently have found reversible error when a prosecutor asserts his belief concerning the proper disposition of the case. United States v. Bess, 593 F. 2d 749 (6th Cir. 1979), United States v. Gonzales Vargas, 558 F. 2d 631 (1st Cir. 1977), Harris v. United States, 402 F. 2d 656 (D.C. Cir. 1968) (Burger, J.).

Several times the prosecutor said that if Petitioner received a life sentence Petitioner would kill again. (T Trial 896 - 901). He refered to individual jurors by name, and told them repeatedly that if Petitioner was not sentenced to death his next murder would be on their conscience. (T Trial 895 - 902).

The prosecutor called Petitioner "less than human," and said "he is not somebody in our society that we can afford to keep." (T Trial 896). These statements represent an indefensible appeal to the passions and prejudices of the jury.

The prosecutor recounted to the jury personal experiences. He told the jury that he had written personally to the Board of Pardons and Paroles to try to prevent Petitioner from being paroled for a prior offense. (T Trial 900).

He described to the jury his experiences the day he was called to the crime scene. "I looked at the necklace of maggots, I smelled the smells. I knew that some day in the not-too-distant future I'd be standing there."(T Trial 900).

The prosecutor was not a witness in this case. Though the jury was likely to respond to his stories as it would respond to testimony, Petitioner did not have the opportunity to confront and cross-examine him.

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their belief that the right to confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal. Pointers v. Texas, 380 U.S. 400, 405 (1964).

Several times the prosecutor said that Petitioner would be paroled if he received a life sentence. (T Trial 736, 749). These statements were in violation of Ga. Code Ann. §26-1101, and in violation of the ABA standards of Conduct. ABA Standards, The Prosecution Function §5.8(d). Significantly, this argument placed before the jury a misleading assertion on an issue that could only distract the jury from its delegated task.

After providing the jury with all these prejudicial arguments, the prosecutor emphasized that the jury would not be responsible for the Petitioner's death if it voted for the death penalty. (T Trial 769-70). This argument is a complete aboutface

from this Court's hope, stated in McGautha v. California, 402 U.S. 193 (1971), that "jurors confronted with the truly awesome responsibility of decreeing death for a fellow human being will act with due regard for the consequences of their decision." Supra p. 208.

Over the years American courts and legislatures have struggled "to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual." Eddings v. Oklahoma, 50 U.S.L.W. 4161, 4163 (1982). The excesses of the prosecutor in the sentencing phase of Petitioner's trial denied Petitioner even the semblance of a rational hearing on the question of life or death.

II

THE PROSECUTOR'S COMMENT ON PETITIONER'S EXERCISE OF HIS RIGHT NOT TO TESTIFY VIOLATED PETITIONER'S RIGHT AGAINST SELF-INCRIMINATION, RIGHT TO A FAIR TRIAL, RIGHT TO A RELIABLE, NONARBITRARY SENTENCING DETERMINATION, AND THE RIGHT TO DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES.

Petitioner did not take the stand during the guilt/innocence phase of his bifurcated capital trial. He indicated to the court that he would take the stand during the sentencing phase. (T Trial 722). Defense counsel submitted a request to charge on defendant's election not to testify, but the trial court did not include the charge in instructions to the jury. (T Trial, 781).

Petitioner did testify in his own behalf during the sentencing phase. In his testimony, offered as evidence of mitigating circumstances to his crime, Petitioner explained what he considered his relatively minor role in the crime compared to the roles of others not charged.

The prosecutor argued in his closing argument in the sentencing phase that Petitioner had had an ulterior motive in his failure to testify during the guilt/innocence phase of the trial.

> Well, why then did this defendant all of a sudden in this stage of the trial get on the stand and start telling you these lies that he's told you - or told you yesterday? It's very simple. The defense is playing games with you. They knew and this defendant knew that the evidence in this case was strong on the issue of guilt, and there was really no point in him testifying in the first stage of the trial to convince you that he was innocent.... He knew that he couldn't convince you that he was innocent, but he thought he could plant a seed of doubt in your minds that somebody else ought to be

> punished. That's the type of person that Richard Tucker is. (T Trial 894-5)

As this Court explained in Doyle v. Ohio, 426 U.S. 610, 617 (1976), "Every post arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested." Defendants have a right to remain silent, and prosecution comments construing the silence of a defendant after he is arrested violate the rights of that defendant against self-incrimination. Griffin v. California, 380 U.S. 609 (1964).

Justice Black wrote:

> I can think of no special circumstance that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privilege is largely destroyed in persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts which act only under the constitution to draw inferences of lack of honesty from invocation of a privilege deemed worthy of enshrinement in the constitution. Grunewald v. United States, 353 U.S. 391, 425-6 (1957) (Black, J. Concurring).

Justice Black's argument applies with the greatest force when the penalty sought is death. Furthermore, a defendant on trial for his life has a constitutional right, based on the Eighth and Fourteenth Amendments, to offer evidence on the mitigating circumstances of his crime.

> The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor any aspect of a defendant's character or record, and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 604 (1978)

Petitioner's testimony, explaining what he considered his relatively minor role in the crime, was unquestionably relevant to mitigation.[1]

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1. The Georgia capital sentencing statute allows for consideration of any mitigating circumstances. Ga. Code Ann. §27-2534.1 (b). It does not include a list of mitigating circumstances. Several states statutes which do include such a list specifically mention in the list that the defendant played a relatively minor role among those responsible for the crime. See, e.g., Conn. Gen. Stat. Ann. §53a-46a-f(4), Fla. Stat. §921.141 (6)(d), Miss. Code Ann. §99-19-101-6(d).

The prosecutor's comment on Petitioner's silence during the guilt/innocence phase served to penalize Petitioner, both for exercising his constitutional right to remain silent during the guilt/innocence phase of the trial, and for exercising his constitutional right to offer evidence on mitigation in the sentencing phase of the trial. If allowed in the future, such comments would deter defendants from offering evidence on mitigation, and seriously damage the safeguards required in a capital sentencing procedure permissable under the Eighth and Fourteenth Amendments.

WHEREFORE, for the reasons shown, a writ of certiorari should issue to review the judgements and opinions of the Superior Court of Butts County, Georgia.

Respectfully submitted,

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